

## RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

Part  
2 of 2

Appendix R ... has been added to the 2017 LRB-6074

Appendix A ☞ LRB 17-5979

Appendix B ☞ LRB 17-5982

Appendix C ☞ LRB 17-5983

Appendix D ☞ LRB 17-5985

Appendix E ☞ LRB 17-5986

Appendix F ☞ LRB 17-5989

Appendix G ☞ LRB 17-5990

Appendix H ☞ LRB 17-5995

Appendix I ☞ LRB 17-5998

Appendix J ☞ LRB 17-6001

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Appendix L ☞ LRB 17-6006

Appendix M ☞ LRB 17-6007

Appendix N ☞ LRB 17-6012

Appendix O ☞ LRB 17-6015

Appendix P ☞ LRB 17-6017

Appendix Q ☞ LRB 17-6019

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Appendix AA ☞ LRB 17-6038

Appendix BB ☞ LRB 17-6039

Appendix CC ☞ LRB 17-6040

Appendix DD ☞ LRB 17-6041

Appendix EE ☞ LRB 17-6042

Appendix FF ☞ LRB 17-6043

Appendix GG ☞ LRB 17-6046

Appendix HH ☞ LRB 17-6047

Appendix II ☞ LRB 17-6048

Appendix JJ ☞ LRB 17-6049

Appendix KK ☞ LRB 17-6050

Appendix LL ☞ LRB 17-6051

Appendix MM ☞ LRB 17-6052

Appendix NN ☞ LRB 17-6058

Appendix OO ☞ LRB 17-6059

Appendix PP ☞ LRB 17-6065

Appendix QQ ☞ LRB 17-6067



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P6  
SWB/RAC/CMH:all

1/P7

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT** *to renumber and amend* 165.08; *to amend* 165.10, 165.25 (6) (a),  
2             806.04 (11) and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to*  
3             **create** 13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to  
4             the legislature of claims relating to constitutionality of statutes and right of the  
5             legislature to intervene and state settlement moneys and the settlement  
6             authority of the attorney general.

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***Analysis by the Legislative Reference Bureau***

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1

**SECTION 1.** 13.365 of the statutes is created to read:

1           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
2 challenges the constitutionality of a statute, facially or as applied, as part of a claim  
3 or affirmative defense:

4           (1) The committee on assembly organization may intervene in the action on  
5 behalf of the assembly. The committee on assembly organization may obtain legal  
6 counsel other than from the department of justice, with the cost of representation  
7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
8 action in which the assembly intervenes.

9           (2) The committee on senate organization may intervene in the action on behalf  
10 of the senate. The committee on senate organization may obtain legal counsel other  
11 than from the department of justice, with the cost of representation paid from the  
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
13 the senate intervenes.

14           (3) The joint committee on legislative organization may intervene in the action  
15 on behalf of the state. The joint committee on legislative organization may obtain  
16 legal counsel other than from the department of justice, with the cost of  
17 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as  
18 determined by the cochairpersons, to represent the state in any action in which the  
19 joint committee on legislative organization intervenes.

20           **SECTION 2.** 165.08 of the statutes is renumbered 165.08 (1) and amended to  
21 read:

22           165.08 (1) Any civil action prosecuted by the department by direction of any  
23 officer, department, board, or commission, shall be compromised or discontinued  
24 when so directed by such officer, department, board, or commission.

## SECTION 2

1           (2) Any civil action prosecuted by the department on the initiative of the  
2 attorney general, or at the request of any individual may be compromised or  
3 discontinued with the approval of the governor by submitting a proposed plan to the  
4 joint committee on finance for the approval of the committee. The compromise or  
5 discontinuance may occur only if the joint committee on finance approves the  
6 proposed plan. No proposed plan may be submitted to the joint committee on finance  
7 if the plan concedes the unconstitutionality or other invalidity of a statute, facially  
8 or as applied, without the approval of the joint committee on legislative organization.

9           (3) In any criminal action prosecuted by the attorney general, the department  
10 shall have the same powers with reference to such action as are vested in district  
11 attorneys.

12           SECTION 3. 165.10 of the statutes is amended to read:

13           **165.10 Limits on expenditure Deposit of discretionary settlement**  
14 **funds.** ~~Notwithstanding s. 20.455 (3), before the~~ The attorney general may expend  
15 ~~shall deposit all~~ settlement funds under s. 20.455 (3) (g) that are not committed  
16 under the terms of the settlement, the attorney general shall submit to the joint  
17 committee on finance a proposed plan for the expenditure of the funds. If the  
18 cochairpersons of the committee do not notify the attorney general within 14 working  
19 days after the submittal that the committee has scheduled a meeting for the purpose  
20 of reviewing the proposed plan, the attorney general may expend the funds to  
21 implement the proposed plan. If, within 14 working days after the submittal, the  
22 cochairpersons of the committee notify the attorney general that the committee has  
23 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
24 general may expend the funds only to implement the plan as approved by the  
25 committee into the general fund.

1251 →  
1 SECTION 4. 165.25 (6) (a) of the statutes is amended to read:

2 165.25 (6) (a) ~~At 1. Except as provided in s. 893.825 (2),~~ at the request of the  
3 head of any department of state government, the attorney general may appear for  
4 and defend any state department, or any state officer, employee, or agent of the  
5 department in any civil action or other matter brought before a court or an  
6 administrative agency which is brought against the state department, or officer,  
7 employee, or agent for or on account of any act growing out of or committed in the  
8 lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
9 expenses determined by the attorney general to be reasonable and necessary to the  
10 defense in the action or proceeding shall be paid as provided for in s. 885.07.

11 2. The attorney general may compromise and settle the action as the attorney  
12 general determines to be in the best interest of the state except that, if the action is  
13 for injunctive relief or there is a proposed consent decree, the attorney general may  
14 not compromise or settle the action without first submitting a proposed plan to the  
15 joint committee on finance. If, within 14 working days after the plan is submitted,  
16 the cochairpersons of the committee notify the attorney general that the committee  
17 has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
18 general may compromise or settle the action only with the approval of the committee.  
19 The attorney general may not submit a proposed plan to the joint committee on  
20 finance under this subdivision in which the plan concedes the unconstitutionality or  
21 other invalidity of a statute, facially or as applied, without the approval of the joint  
22 committee on legislative organization.

23 3. Members, officers, and employees of the Wisconsin state agencies building  
24 corporation and the Wisconsin state public building corporation are covered by this  
25 section. Members of the board of governors created under s. 619.04 (3), members of

1 a committee or subcommittee of that board of governors, members of the injured  
2 patients and families compensation fund peer review council created under s.  
3 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
4 covered by this section with respect to actions, claims, or other matters arising  
5 before, on, or after April 25, 1990. The attorney general may compromise and settle  
6 claims asserted before such actions or matters formally are brought or may delegate  
7 such authority to the department of administration. This paragraph may not be  
8 construed as a consent to sue the state or any department thereof or as a waiver of  
9 state sovereign immunity.

10 **SECTION 5.** 803.09 (2m) of the statutes is created to read:

11 **803.09 (2m)** When a party to an action challenges the constitutionality of a  
12 statute, facially or as applied, as part of a claim or affirmative defense, the assembly,  
13 the senate, and the state legislature may intervene in the action as a matter of right  
14 by serving a motion upon the parties as provided in s. 801.14. For purposes of this  
15 subsection, a motion to intervene shall be considered timely if it is filed within 45  
16 days of receiving service under s. 806.04 (11) or 893.825 or if no service has been made  
17 under s. 806.04 (11) or 893.825.

18 **SECTION 6.** 806.04 (11) of the statutes is amended to read:

19 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be  
20 made parties who have or claim any interest which would be affected by the  
21 declaration, and no declaration may prejudice the right of persons not parties to the  
22 proceeding. In any proceeding which involves the validity of a municipal ordinance  
23 or franchise, the municipality shall be made a party, and shall be entitled to be heard.  
24 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney  
25 general shall also be served with a copy of the proceeding and, except as provided

*m. state or federal court ✓*

1 under this subsection, be entitled to be heard. If a statute is alleged to be  
 2 unconstitutional, the speaker of the assembly, the president of the senate, and the  
 3 senate majority leader shall also be served with a copy of the proceeding and the  
 4 assembly, the senate, and the state legislature are entitled to be heard. <sup>e</sup>The assembly  
 5 shall represent the assembly, the senate shall represent the senate, and the joint  
 6 committee on legislative organization shall represent the state. In an action  
 7 involving the constitutionality of a statute, if the joint committee on legislative  
 8 organization determines that the interests of the state will be best represented by  
 9 special counsel appointed by the legislature, it shall appoint special counsel to  
 10 represent state defendants and act instead of the attorney general. Special counsel  
 11 appointed under this subsection shall have the powers of the attorney general with  
 12 respect to the litigation to which special counsel has been appointed. In any  
 13 proceeding under this section in which the constitutionality, construction or  
 14 application of any provision of ch. 227, or of any statute allowing a legislative  
 15 committee to suspend, or to delay or prevent the adoption of, a rule as defined in s.  
 16 227.01 (13) is placed in issue by the parties, the joint committee for review of  
 17 administrative rules shall be served with a copy of the petition and, with the approval  
 18 of the joint committee on legislative organization, shall be made a party and be  
 19 entitled to be heard. In any proceeding under this section in which the  
 20 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227  
 21 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a  
 22 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
 23 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on  
 24 legislative organization shall be served with a copy of the petition and the joint  
 25 committee on legislative organization, the senate committee on organization or the

If the assembly, the senate, or the joint committee on legislative organization ~~shall~~  
 intervene as provided under s. 803.09 (2m), the

INS  
8-3 (SWB)  
1 assembly committee on organization may intervene as a party to the proceedings and  
2 be heard.

3 SECTION 7 Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
4 statutes is amended to read:

### CHAPTER 893

#### SUBCHAPTER VIII

#### CLAIMS AGAINST GOVERNMENTAL

#### BODIES, OFFICERS AND EMPLOYEES;

#### CONSTITUTIONAL CLAIMS

5  
6  
7  
8  
9  
10 SECTION 8 893.825 of the statutes is created to read:

11 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is  
12 alleged to be unconstitutional, the attorney general shall be served with a copy of the  
13 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
14 be heard.

15 (2) If a statute is alleged to be unconstitutional, the speaker of the assembly,  
16 the president of the senate, and the senate majority leader shall also be served with  
17 a copy of the proceeding and the assembly, the senate, and the joint committee on  
18 legislative organization are entitled to be heard. The assembly shall represent the  
19 assembly, the senate shall represent the senate, and the joint committee on  
20 legislative organization shall represent the state. In an action involving the  
21 constitutionality of a statute, if the joint committee on legislative organization  
22 determines that the interests of the state will be best represented by special counsel  
23 appointed by the legislature, it shall appoint special counsel to represent state  
24 defendants and act instead of the attorney general. Special counsel appointed under

IF the assembly, the senate, or the joint committee on legislative organization  
determines as provided under 893.09 (2m), the

1 this subsection shall have the powers of the attorney general with respect to the  
2 litigation to which special counsel has been appointed.

3 **SECTION 9: Fiscal changes.**

4 (1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s.  
5 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general  
6 fund the unencumbered balance of any settlement funds in that appropriation  
7 account, as determined by the attorney general.

8 (END)

INS

9-3  
(SWB)

SETTLEMENT  
FUNDS.

**2019-2020 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P6ins  
SWB/RAC/CMH:all

1  
2  
3      3-19      5a ✓  
4      ✓ Insert 4-12

5      **SECTION 1.** 165.07 of the statutes is created to read:

6      **165.07 Intervention by joint committee on legislative organization.** If

7      the joint committee on legislative organization intervenes in an action in state or  
8      federal court as permitted under s. 803.09 (2m) ✓, the attorney general shall notify the  
9      court of the substitution of counsel by special counsel appointed by the joint  
10      committee on legislative organization and may not participate in the action.

11      ✓ Insert 5-1

12      **SECTION 2.** 165.25 (1m) of the statutes is amended to read:

13      165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on  
14      legislative organization does not intervene as permitted under s. 803.09 (2m) ✓, if  
15      requested by the governor or either house of the legislature, appear for and represent  
16      the state, any state department, agency, official, employee or agent, whether  
17      required to appear as a party or witness in any civil or criminal matter, and prosecute  
18      or defend in any court or before any officer, any cause or matter, civil or criminal, in  
19      which the state or the people of this state may be interested. The public service  
20      commission may request under s. 196.497 (7) that the attorney general intervene in  
21      federal proceedings. All expenses of the proceedings shall be paid from the  
22      appropriation under s. 20.455 (1) (d).

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36 s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19); 1995 a. 201; 1997 a. 27, 111; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1; 2007 a. 20 ss. 2904, 9121 (6) (a); 2007 a. 76, 79, 96, 130, 225; 2009 a. 2, 28, 42; 2011 a. 32, 35; 2013 a. 20 ss. 164, 166, 167, 180, 1904m; 2013 a. 166 s. 76; 2013 a. 173, 223, 241; 2015 a. 55, 118; 2017 a. 59, 261, 337.

1

**INSERT 8-3 (SWB)**

2       † **SECTION 7.** 809.13 of the statutes is amended to read:

3               **809.13 Rule (Intervention).** A person who is not a party to an appeal may  
4       file in the court of appeals a petition to intervene in the appeal. A party may file a  
5       response to the petition within 11 days after service of the petition. The court may  
6       grant the petition upon a showing that the petitioner's interest meets the  
7       requirements of s. 803.09 (1) or, (2), or (2m).

*History:* Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii.

*Judicial Council Committee's Note, 1978:* Former s. 817.12 (6) permitted the addition of parties but did not set the criteria for doing so. This void is filled by making the intervention rule in the Rules of Civil Procedure applicable to proceedings in the Court of Appeals. [Re Order effective July 1, 1978]

*Judicial Council Note, 2001:* The 7-day time limit has been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. [Re Order No. 00-02 effective July 1, 2001]

**END INSERT 8-3 (SWB)**

**INSERT 9-3 (SWB)**

8               **SECTION 30. Nonstatutory provisions.**

9               (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE  
10       ORGANIZATION. The assembly, senate, and joint committee on legislative organization  
11       may intervene as permitted under s. 803.09 (2m) in any litigation pending in state  
12       or federal court on the effective date of this subsection. If the joint committee on  
13       legislative organization intervenes and appoints special counsel to represent state  
14       defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall  
15       notify the court of the substitution of counsel by special counsel appointed by the joint  
16       committee on legislative organization to represent the state defendants and may not  
17       participate in the action.

**END INSERT 9-3 (SWB)**



1/p7 - from Steve

① Expand -- not just constitutionality  
but other claims of violating  
fed law or preempted

② May intervene AT ANY TIME -  
(p. 7, lines 8-10 end)

③ Treat 165.25 (1) to minor (1m)

JCL0

④ Intervenes -- AG may not participate



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P7  
SWB/RAC/CMH:all

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to renumber and amend* 165.08; *to amend* 165.10, 165.25 (1m), 165.25  
2 (6) (a), 806.04 (11), 809.13 and subchapter VIII (title) of chapter 893 [precedes  
3 893.80]; and *to create* 13.365, 165.07, 803.09 (2m) and 893.825 of the statutes;  
4 **relating to:** notice to the legislature of claims relating to constitutionality of  
5 statutes and right of the legislature to intervene and state settlement moneys  
6 and the settlement authority of the attorney general.

or enforce ability

*Analysis by the Legislative Reference Bureau*

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

Violation of  
or in conflict with  
or preempted  
by  
federal  
law

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

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7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any  
8 action in which the assembly intervenes.

9 (2) The committee on senate organization may intervene *at any time* in the action on behalf  
10 of the senate. The committee on senate organization may obtain legal counsel other  
11 than from the department of justice, with the cost of representation paid from the  
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which  
13 the senate intervenes.

14 (3) The joint committee on legislative organization may intervene *at any time* in the action  
15 on behalf of the state. The joint committee on legislative organization may obtain  
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10 discontinuance may occur only if the joint committee on finance approves the  
11 proposed plan. No proposed plan may be submitted to the joint committee on finance  
12 if the plan concedes the unconstitutionality or other invalidity of a statute, facially  
13 or as applied, without the approval of the joint committee on legislative organization.

14 (3) In any criminal action prosecuted by the attorney general, the department  
15 shall have the same powers with reference to such action as are vested in district  
16 attorneys.

17 **SECTION 4.** 165.10 of the statutes is amended to read:

18 **165.10 Limits on expenditure Deposit of discretionary settlement**  
19 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend  
20 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed  
21 under the terms of the settlement, the attorney general shall submit to the joint  
22 committee on finance a proposed plan for the expenditure of the funds. If the  
23 cochairpersons of the committee do not notify the attorney general within 14 working  
24 days after the submittal that the committee has scheduled a meeting for the purpose  
25 of reviewing the proposed plan, the attorney general may expend the funds to

INS  
4-13

as created by 2017 Wisconsin Act 59

1 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~  
2 ~~cochairpersons of the committee notify the attorney general that the committee has~~  
3 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~  
4 ~~general may expend the funds only to implement the plan as approved by the~~  
5 ~~committee into the general fund.~~

6 **SECTION 5.** 165.25 (1m) of the statutes is amended to read:

7 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on  
8 legislative organization does not intervene as permitted under s. 803.09 (2m), if  
9 requested by the governor or either house of the legislature, appear for and represent  
10 the state, any state department, agency, official, employee or agent, whether  
11 required to appear as a party or witness in any civil or criminal matter, and prosecute  
12 or defend in any court or before any officer, any cause or matter, civil or criminal, in  
13 which the state or the people of this state may be interested. <sup>INS 5-13</sup> The public service  
14 commission may request under s. 196.497 (7) that the attorney general intervene in  
15 federal proceedings. All expenses of the proceedings shall be paid from the  
16 appropriation under s. 20.455 (1) (d).

17 **SECTION 6.** 165.25 (6) (a) of the statutes is <sup>renumbered 165.25 (6) (a)</sup> amended to read:

18 165.25 (6) (a) <sup>At 10</sup> ~~Except as provided in s. 893.825 (2),~~ at the request of the  
19 head of any department of state government, the attorney general may appear for  
20 and defend any state department, or any state officer, employee, or agent of the  
21 department in any civil action or other matter brought before a court or an  
22 administrative agency which is brought against the state department, or officer,  
23 employee, or agent for or on account of any act growing out of or committed in the  
24 lawful course of an officer's, employee's, or agent's duties. Witness fees or other

1 expenses determined by the attorney general to be reasonable and necessary to the  
2 defense in the action or proceeding shall be paid as provided for in s. 885.07.

3 <sup>Wgt</sup> <sup>gr</sup> The attorney general may compromise and settle the action as the attorney  
4 general determines to be in the best interest of the state except that, if the action is  
5 for injunctive relief or there is a proposed consent decree, the attorney general may  
6 not compromise or settle the action without first submitting a proposed plan to the  
7 joint committee on finance. If, within 14 working days after the plan is submitted,  
8 the cochairpersons of the committee notify the attorney general that the committee  
9 has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
10 general may compromise or settle the action only with the approval of the committee.  
11 The attorney general may not submit a proposed plan to the joint committee on  
12 finance under this subdivision in which the plan concedes the unconstitutionality or  
13 other invalidity of a statute, facially or as applied, without the approval of the joint  
14 committee on legislative organization. <sup>INS 6-13</sup>

15 <sup>2</sup> ~~3~~ Members, officers, and employees of the Wisconsin state agencies building  
16 corporation and the Wisconsin state public building corporation are covered by this  
17 section. Members of the board of governors created under s. 619.04 (3), members of  
18 a committee or subcommittee of that board of governors, members of the injured  
19 patients and families compensation fund peer review council created under s.  
20 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
21 covered by this section with respect to actions, claims, or other matters arising  
22 before, on, or after April 25, 1990. The attorney general may compromise and settle  
23 claims asserted before such actions or matters formally are brought or may delegate  
24 such authority to the department of administration. This paragraph may not be

1 construed as a consent to sue the state or any department thereof or as a waiver of  
2 state sovereign immunity.

3 **SECTION 7.** 803.09 (2m) of the statutes is created to read:

4 **803.09 (2m)** When a party to an action challenges in state or federal court the  
5 constitutionality of a statute, facially or as applied, as part of a claim or affirmative  
6 defense, the assembly, the senate, and the state legislature may intervene <sup>at any time</sup> in the  
7 action as a matter of right by serving a motion upon the parties as provided in s.

8 801.14. For purposes of this subsection, a motion to intervene shall be considered  
9 timely if it is filed within 45 days of receiving service under s. 806.04 (11) or 893.825  
10 or if no service has been made under s. 806.04 (11) or 893.825.

11 **SECTION 8.** 806.04 (11) of the statutes is amended to read:

12 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be  
13 made parties who have or claim any interest which would be affected by the  
14 declaration, and no declaration may prejudice the right of persons not parties to the  
15 proceeding. In any proceeding which involves the validity of a municipal ordinance  
16 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

17 If a statute, ordinance or franchise is alleged to be unconstitutional, <sup>INS 7-17</sup> the attorney  
18 general shall also be served with a copy of the proceeding and, except as provided

19 under this subsection, be entitled to be heard. If a statute is alleged to be  
20 unconstitutional, the speaker of the assembly, the president of the senate, and the

21 senate majority leader shall also be served with a copy of the proceeding and the  
22 assembly, the senate, and the state legislature are entitled to be heard. If the

23 assembly, the senate, or the joint committee on legislative organization intervenes

24 as provided under s. 803.09 (2m), the assembly shall represent the assembly, the

25 senate shall represent the senate, and the joint committee on legislative

INS 7-20

## SECTION 8

MS 8-2

1 organization shall represent the state. In an action involving the constitutionality  
 2 of a statute, if the joint committee on legislative organization determines that the  
 3 interests of the state will be best represented by special counsel appointed by the  
 4 legislature, it shall appoint special counsel to represent state defendants and act  
 5 instead of the attorney general. Special counsel appointed under this subsection  
 6 shall have the powers of the attorney general with respect to the litigation to which  
 7 special counsel has been appointed. In any proceeding under this section in which  
 8 the constitutionality, construction or application of any provision of ch. 227, or of any  
 9 statute allowing a legislative committee to suspend, or to delay or prevent the  
 10 adoption of, a rule as defined in s. 227.01 (13) is placed in issue by the parties, the  
 11 joint committee for review of administrative rules shall be served with a copy of the  
 12 petition and, with the approval of the joint committee on legislative organization,  
 13 shall be made a party and be entitled to be heard. In any proceeding under this  
 14 section in which the constitutionality, construction or application of any provision of  
 15 ch. 13, 20, 111, 227 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute  
 16 allowing a legislative committee to suspend, or to delay or prevent the adoption of,  
 17 a rule as defined in s. 227.01 (13) is placed in issue by the parties, the joint committee  
 18 on legislative organization shall be served with a copy of the petition and the joint  
 19 committee on legislative organization, the senate committee on organization or the  
 20 assembly committee on organization may intervene as a party to the proceedings and  
 21 be heard.

at any time  
in the action

22 SECTION 9. 809.13 of the statutes is amended to read:

23 **809.13 Rule (Intervention).** A person who is not a party to an appeal may  
 24 file in the court of appeals a petition to intervene in the appeal. A party may file a  
 25 response to the petition within 11 days after service of the petition. The court may

1 grant the petition upon a showing that the petitioner's interest meets the  
2 requirements of s. 803.09 (1) ~~or~~, (2), or (2m).

3 **SECTION 10.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
4 statutes is amended to read:

5 **CHAPTER 893**

6 **SUBCHAPTER VIII**

7 **CLAIMS AGAINST GOVERNMENTAL**  
8 **BODIES, OFFICERS AND EMPLOYEES;**

9 **~~CONSTITUTIONAL CLAIMS~~**

10 **SECTION 11.** 893.825 of the statutes is created to read:

11 **893.825 ~~Claim~~ <sup>Actions</sup> alleging a statute is unconstitutional.** (1) <sup>INS 9-11</sup> If a statute is  
12 alleged to be unconstitutional, <sup>In an action in which</sup> the attorney general shall be served with a copy of the  
13 proceeding and, except as provided in sub. (2), is entitled to represent the state and  
14 be heard.

15 (2) <sup>In an action in which</sup> If a statute is alleged to be unconstitutional, <sup>INS 9-15</sup> the speaker of the assembly,  
16 the president of the senate, and the senate majority leader shall also be served with  
17 a copy of the proceeding and the assembly, the senate, and the joint committee on  
18 legislative organization are entitled to be heard. <sup>If the assembly, the senate, or the</sup>

19 ~~joint committee on legislative organization intervenes~~ as provided under s. 803.09  
20 (2m), the assembly shall represent the assembly, the senate shall represent the

21 senate, and the joint committee on legislative organization shall represent the state.

22 In an action involving the constitutionality of a statute, <sup>INS 9-22</sup> if the joint committee on  
23 legislative organization determines that the interests of the state will be best  
24 represented by special counsel appointed by the legislature, it shall appoint special  
25 counsel to represent state defendants and act instead of the attorney general

at any time

and the attorney  
general may  
not participate  
in the  
proceeding

1 Special counsel appointed under this subsection shall have the powers of the  
2 attorney general with respect to the litigation to which special counsel has been  
3 appointed.

4 **SECTION 12. Nonstatutory provisions.**

5 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE  
6 ORGANIZATION. The assembly, senate, and joint committee on legislative organization  
7 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state  
8 or federal court on the effective date of this subsection. If the joint committee on  
9 legislative organization intervenes and appoints special counsel to represent state  
10 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall  
11 notify the court of the substitution of counsel by special counsel appointed by the joint  
12 committee on legislative organization to represent the state defendants and may not  
13 participate in the action.

14 **SECTION 13. Fiscal changes.**

15 (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the  
16 appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,  
17 there is lapsed to the general fund the unencumbered balance of any settlement  
18 funds in that appropriation account, as determined by the attorney general.

19 (END)

**2019-2020 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P8ins  
SWB/RAC/CMH:all

1           Insert 3-3

2           or challenges a statute as violating or preempted by federal law,

4           Insert 4-13

5           or concedes that a statute violates or is preempted by federal law,

7           Insert 5-6

8           **SECTION 1.** 165.25 (1) of the statutes is amended to read:

9           165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in  
10          ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative  
11          organization does not intervene as permitted under s. 803.09 (2m), appear for the  
12          state and prosecute or defend all actions and proceedings, civil or criminal, in the  
13          court of appeals and the supreme court, in which the state is interested or a party,  
14          and attend to and prosecute or defend all civil cases sent or remanded to any circuit  
15          court in which the state is a party. Nothing The joint committee on legislative  
16          organization may intervene as permitted under s. 803.09 (2m) at any time, and if the  
17          committee intervenes, the attorney general shall notify the court of the substitution  
18          of counsel by special counsel appointed by the committee to represent the state and  
19          may not participate in the action, proceeding, or case. Unless the joint committee  
20          intervenes as permitted under s. 803.09 (2m), nothing in this subsection deprives or  
21          relieves the attorney general or the department of justice of any authority or duty  
22          under this chapter.

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36 s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19); 1995 a. 201; 1997 a. 27, 141; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1; 2007 a. 20 ss. 2904, 9121 (6) (a); 2007 a. 76, 79, 96, 130, 225; 2009 a. 2, 28, 42; 2011 a. 32, 35; 2013 a. 20 ss. 164, 166, 167, 180, 1904m; 2013 a. 166 s. 76; 2013 a. 173, 223, 241; 2015 a. 55, 118; 2017 a. 59, 261, 337.

*in any other  
matter*

*on legislative  
organization*

1           Insert 5-13

2           The joint committee on legislative organization may intervene as permitted  
3 under s. 803.09 (2m) at any time, and if the committee intervenes, the attorney  
4 general shall notify the court of the substitution of counsel by special counsel  
5 appointed by the committee to represent the state and may not participate in the  
6 cause or matter.

7  
8           Insert 6-13

9           or concedes that a statute violates or is preempted by federal law,

10  
11          Insert 7-5

12          or challenges a statute as violating or preempted by federal law,

13  
14          Insert 7-17

15          or to be in violation of or preempted by federal law,

16  
17          Insert 7-20

18          or to be in violation of or preempted by federal law,

19  
20          Insert 8-2

21          or challenging a statute as violating or preempted by federal law,

22  
23          Insert 9-11

24          **or in violation of or preempted by federal law**

25

1           Insert 9-12  
2           <sup>to be</sup>  
          or in violation of or preempted by federal law,  
3           ^

4           Insert 9-15  
5           <sup>to be</sup>  
          or in violation of or preempted by federal law,  
6           ^

7           Insert 9-22  
8           or challenging a statute as violating or preempted by federal law,  
9

**2019-2020 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P8ins2  
SWB/RAC/CMH:all

1  
2       **SECTION 1.** 13.56 (2) of the statutes is amended to read:

3       13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint  
4 committee for review of administrative rules or their designated agents shall accept  
5 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that  
6 the legislature should be represented in the proceeding, it shall request the joint  
7 committee on legislative organization to designate the legislature's representative  
8 for intervene in the proceeding as provided under s. 806.04 (11). The costs of  
9 participation in the proceeding shall be paid equally from the appropriations under  
10 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice  
11 shall be paid from the appropriation under s. 20.455 (1) (d).

**History:** 1973 c. 90, 162; 1973 c. 334 s. 58; 1973 c. 336; 1975 c. 224; 1975 c. 414 s. 28; 1977 c. 29, 277, 449; 1979 c. 34 ss. 2qcm, 2102 (32) (b); 1979 c. 270; 1981 c. 253; 1983 a. 27; 1985 a. 182 ss. 1 to 6, 57; 2003 a. 33; 2005 a. 25.

**Cross-reference:** See s. 227.19 (1) for a statement of legislative policy regarding legislative review of administrative rules. See s. 227.26 for review after promulgation of rules.

12       **SECTION 2.** 13.90 (2) of the statutes is amended to read:

13       13.90 (2) The cochairpersons of the joint committee on legislative organization  
14 or their designated agent shall accept service made under <sup>ss.</sup> ~~s.~~ 806.04 (11). If the  
15 committee, the senate organization committee<sup>^</sup> or the assembly organization  
16 committee<sup>↓</sup> determines that the legislature should ~~be represented~~ intervene in the  
17 proceeding, ~~that committee shall designate the legislature's representative for the~~  
18 ~~proceeding. The~~ as provided under s. 806.04 (11), the costs of participation in the  
19 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and  
20 (b), except that such costs incurred by the department of justice shall be paid from  
21 the appropriation under s. 20.455 (1) (d).

**History:** 1971 c. 215; 1973 c. 90; 1975 c. 224, 421; 1977 c. 449; 1979 c. 34 ss. 7d to 7s, 2102 (32) (b); 1981 c. 372 s. 18; 1983 a. 27, 308; 1985 a. 29, 332; 1987 a. 27; 1989 a. 31, 359, 366; 1993 a. 52; 1995 a. 27, 162, 417; 1997 a. 27, 237; 1999 a. 4, 29, 81; 2001 a. 16; 2003 a. 33; 2005 a. 25; 2007 a. 20.

INS  
INSERT

The

plain



Per discussion w/ Steve

add x-ref in 165.25(6)(a)1. provision to D actions (806.04(1))  
in the added language ["except as provided...."]



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P8  
SWB/RAC/CMH:all

2  
/pg

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1/11/30  
Revised  
new plan 20

1 AN ACT *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),  
2 13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter  
3 VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,  
4 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature  
5 of claims relating to constitutionality or enforceability of statutes and right of  
6 the legislature to intervene and state settlement moneys and the settlement  
7 authority of the attorney general.

---

*Analysis by the Legislative Reference Bureau*

*Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention*

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

---

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges in state or federal court the constitutionality of a statute, facially or as  
4 applied, or challenges a statute as violating or preempted by federal law, as part of  
5 a claim or affirmative defense:

6           (1) The committee on assembly organization may intervene at any time in the  
7 action on behalf of the assembly. The committee on assembly organization may  
8 obtain legal counsel other than from the department of justice, with the cost of  
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the  
10 assembly in any action in which the assembly intervenes.

11           (2) The committee on senate organization may intervene at any time in the  
12 action on behalf of the senate. The committee on senate organization may obtain  
13 legal counsel other than from the department of justice, with the cost of  
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the  
15 senate in any action in which the senate intervenes.

16           (3) The joint committee on legislative organization may intervene at any time  
17 in the action on behalf of the state. The joint committee on legislative organization  
18 may obtain legal counsel other than from the department of justice, with the cost of  
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

**SECTION 1**

1 determined by the cochairpersons, to represent the state in any action in which the  
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint  
5 committee for review of administrative rules or their designated agents shall accept  
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that  
7 the legislature should be represented in the proceeding, it shall request the joint  
8 committee on legislative organization to designate the legislature's representative  
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of  
10 participation in the proceeding shall be paid equally from the appropriations under  
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice  
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 13.90 (2) The cochairpersons of the joint committee on legislative organization  
15 or their designated agent shall accept service made under ~~s.~~ ss. 806.04 (11) and  
16 893.825 (2). If the committee, the senate organization committee, or the assembly  
17 organization committee, determines that the legislature should be represented  
18 intervene in the proceeding, that committee shall designate the legislature's  
19 representative for the proceeding. as provided under s. 803.09 (2m), the assembly  
20 shall represent the assembly, the senate shall represent the senate, and the joint  
21 committee on legislative organization shall represent the state. In an action  
22 involving the constitutionality of a statute, or challenging a statute as violating or  
23 preempted by federal law, if the joint committee on legislative organization  
24 determines at any time that the interests of the state will be best represented by  
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney  
2 general may not participate in the action. Special counsel appointed under this  
3 subsection shall have the powers of the attorney general with respect to the litigation  
4 to which special counsel has been appointed. The costs of participation in the  
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and  
6 (b), except that such costs incurred by the department of justice shall be paid from  
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If  
10 the joint committee on legislative organization intervenes in an action in state or  
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the  
12 court of the substitution of counsel by special counsel appointed by the joint  
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to  
15 read:

16 165.08 (1) Any civil action prosecuted by the department by direction of any  
17 officer, department, board, or commission, shall be compromised or discontinued  
18 when so directed by such officer, department, board, or commission.

19 **(2)** Any civil action prosecuted by the department on the initiative of the  
20 attorney general, or at the request of any individual may be compromised or  
21 discontinued ~~with the approval of the governor by submitting a proposed plan to the~~  
22 joint committee on finance for the approval of the committee. The compromise or  
23 discontinuance may occur only if the joint committee on finance approves the  
24 proposed plan. No proposed plan may be submitted to the joint committee on finance  
25 if the plan concedes the unconstitutionality or other invalidity of a statute, facially

1 or as applied, or concedes that a statute violates or is preempted by federal law,  
2 without the approval of the joint committee on legislative organization.

3 (3) In any criminal action prosecuted by the attorney general, the department  
4 shall have the same powers with reference to such action as are vested in district  
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is  
7 amended to read:

8 **165.10 Limits on expenditure Deposit of discretionary settlement**  
9 **funds.** Notwithstanding s. 20.455 (3), before the ~~The~~ attorney general may expend  
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed  
11 ~~under the terms of the settlement, the attorney general shall submit to the joint~~  
12 ~~committee on finance a proposed plan for the expenditure of the funds. If the~~  
13 ~~cochairpersons of the committee do not notify the attorney general within 14 working~~  
14 ~~days after the submittal that the committee has scheduled a meeting for the purpose~~  
15 ~~of reviewing the proposed plan, the attorney general may expend the funds to~~  
16 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~  
17 ~~cochairpersons of the committee notify the attorney general that the committee has~~  
18 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~  
19 ~~general may expend the funds only to implement the plan as approved by the~~  
20 ~~committee into the general fund.~~

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in  
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative  
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the  
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,  
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit  
3 court in which the state is a party. ~~Nothing~~ The joint committee on legislative  
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the  
5 committee intervenes, the attorney general shall notify the court of the substitution  
6 of counsel by special counsel appointed by the committee to represent the state and  
7 may not participate in the action, proceeding, or case. Unless the joint committee on  
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this  
9 subsection deprives or relieves the attorney general or the department of justice of  
10 any authority or duty under this chapter in any other matter.

11 **SECTION 8.** 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on  
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if  
14 requested by the governor or either house of the legislature, appear for and represent  
15 the state, any state department, agency, official, employee or agent, whether  
16 required to appear as a party or witness in any civil or criminal matter, and prosecute  
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in  
18 which the state or the people of this state may be interested. The joint committee on  
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any  
20 time, and if the committee intervenes, the attorney general shall notify the court of  
21 the substitution of counsel by special counsel appointed by the committee to  
22 represent the state and may not participate in the cause or matter. The public service  
23 commission may request under s. 196.497 (7) that the attorney general intervene in  
24 federal proceedings. All expenses of the proceedings shall be paid from the  
25 appropriation under s. 20.455 (1) (d).

1       **SECTION 9.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and  
2       amended to read:

3       165.25 (6) (a) 1. At Except as provided in s. 893.825 (2), at the request of the  
4       head of any department of state government, the attorney general may appear for  
5       and defend any state department, or any state officer, employee, or agent of the  
6       department in any civil action or other matter brought before a court or an  
7       administrative agency which is brought against the state department, or officer,  
8       employee, or agent for or on account of any act growing out of or committed in the  
9       lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
10      expenses determined by the attorney general to be reasonable and necessary to the  
11      defense in the action or proceeding shall be paid as provided for in s. 885.07. The  
12      attorney general may compromise and settle the action as the attorney general  
13      determines to be in the best interest of the state except that, if the action is for  
14      injunctive relief or there is a proposed consent decree, the attorney general may not  
15      compromise or settle the action without first submitting a proposed plan to the joint  
16      committee on finance. If, within 14 working days after the plan is submitted, the  
17      cochairpersons of the committee notify the attorney general that the committee has  
18      scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
19      general may compromise or settle the action only with the approval of the committee.  
20      The attorney general may not submit a proposed plan to the joint committee on  
21      finance under this subdivision in which the plan concedes the unconstitutionality or  
22      other invalidity of a statute, facially or as applied, or concedes that a statute violates  
23      or is preempted by federal law, without the approval of the joint committee on  
24      legislative organization.

1           2. Members, officers, and employees of the Wisconsin state agencies building  
2 corporation and the Wisconsin state public building corporation are covered by this  
3 section. Members of the board of governors created under s. 619.04 (3), members of  
4 a committee or subcommittee of that board of governors, members of the injured  
5 patients and families compensation fund peer review council created under s.  
6 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
7 covered by this section with respect to actions, claims, or other matters arising  
8 before, on, or after April 25, 1990. The attorney general may compromise and settle  
9 claims asserted before such actions or matters formally are brought or may delegate  
10 such authority to the department of administration. This paragraph may not be  
11 construed as a consent to sue the state or any department thereof or as a waiver of  
12 state sovereign immunity.

13           **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14           803.09 (2m) When a party to an action challenges in state or federal court the  
15 constitutionality of a statute, facially or as applied, or challenges a statute as  
16 violating or preempted by federal law, as part of a claim or affirmative defense, the  
17 assembly, the senate, and the state legislature may intervene at any time in the  
18 action as a matter of right by serving a motion upon the parties as provided in s.  
19 801.14.

20           **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21           806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be  
22 made parties who have or claim any interest which would be affected by the  
23 declaration, and no declaration may prejudice the right of persons not parties to the  
24 proceeding. In any proceeding which involves the validity of a municipal ordinance  
25 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

**SECTION 11**

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in  
2 violation of or preempted by federal law, the attorney general shall also be served  
3 with a copy of the proceeding and, except as provided under this subsection, be  
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation  
5 of or preempted by federal law, the speaker of the assembly, the president of the  
6 senate, and the senate majority leader shall also be served with a copy of the  
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be  
8 heard. If the assembly, the senate, or the joint committee on legislative organization  
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the  
10 assembly, the senate shall represent the senate, and the joint committee on  
11 legislative organization shall represent the state. In an action involving the  
12 constitutionality of a statute, or challenging a statute as violating or preempted by  
13 federal law, if the joint committee on legislative organization determines at any time  
14 that the interests of the state will be best represented by special counsel appointed  
15 by the legislature, it shall appoint special counsel to represent state defendants and  
16 act instead of the attorney general and the attorney general may not participate in  
17 the action. Special counsel appointed under this subsection shall have the powers  
18 of the attorney general with respect to the litigation to which special counsel has been  
19 appointed. In any proceeding under this section in which the constitutionality,  
20 construction or application of any provision of ch. 227, or of any statute allowing a  
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
23 review of administrative rules shall be served with a copy of the petition and, with  
24 the approval of the joint committee on legislative organization, shall be made a party  
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1     ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~  
2     ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~  
3     ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~  
4     ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~  
5     ~~legislative organization shall be served with a copy of the petition and the joint~~  
6     ~~committee on legislative organization, the senate committee on organization or the~~  
7     ~~assembly committee on organization may intervene as a party to the proceedings and~~  
8     ~~be heard.~~

9           **SECTION 12.** 809.13 of the statutes is amended to read:

10          **809.13 Rule (Intervention).** A person who is not a party to an appeal may  
11     file in the court of appeals a petition to intervene in the appeal. A party may file a  
12     response to the petition within 11 days after service of the petition. The court may  
13     grant the petition upon a showing that the petitioner's interest meets the  
14     requirements of s. 803.09 (1) ~~or, (2), or (2m).~~

15          **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
16     statutes is amended to read:

17                                   **CHAPTER 893**

18                                   SUBCHAPTER VIII

19                                   CLAIMS AGAINST GOVERNMENTAL

20                                   BODIES, OFFICERS AND EMPLOYEES;

21                                   ACTIONS ALLEGING A STATUTE IS

22                                   UNCONSTITUTIONAL OR

23                                   OTHERWISE INVALID

24          **SECTION 14.** 893.825 of the statutes is created to read:

1       **893.825 Actions alleging a statute is unconstitutional or in violation of**  
2       **or preempted by federal law.** (1) In an action in which a statute is alleged to be  
3       unconstitutional, or to be in violation of or preempted by federal law, the attorney  
4       general shall be served with a copy of the proceeding and, except as provided in sub.  
5       (2), is entitled to represent the state and be heard.

6       (2) In an action in which a statute is alleged to be unconstitutional, or to be in  
7       violation of or preempted by federal law, the speaker of the assembly, the president  
8       of the senate, and the senate majority leader shall also be served with a copy of the  
9       proceeding and the assembly, the senate, and the joint committee on legislative  
10      organization are entitled to be heard.

11       **SECTION 15. Nonstatutory provisions.**

12      (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE  
13      ORGANIZATION. The assembly, senate, and joint committee on legislative organization  
14      may intervene as permitted under s. 803.09 (2m) in any litigation pending in state  
15      or federal court on the effective date of this subsection. If the joint committee on  
16      legislative organization intervenes and appoints special counsel to represent state  
17      defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall  
18      notify the court of the substitution of counsel by special counsel appointed by the joint  
19      committee on legislative organization to represent the state defendants and may not  
20      participate in the action.

21       **SECTION 16. Fiscal changes.**

22      (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the  
23      appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

1      there is lapsed to the general fund the unencumbered balance of any settlement  
2      funds in that appropriation account, as determined by the attorney general.

3 (END)



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P9  
SWB/RAC/CMH:all

P16

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1     AN ACT *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),  
2         13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter  
3         VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,  
4         803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature  
5         of claims relating to constitutionality or enforceability of statutes and right of  
6         the legislature to intervene and state settlement moneys and the settlement  
7         authority of the attorney general.

---

*Analysis by the Legislative Reference Bureau*

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges in state or federal court the constitutionality of a statute, facially or as  
4 applied, or challenges a statute as violating or preempted by federal law, as part of  
5 a claim or affirmative defense:

6           (1) The committee on assembly organization may intervene at any time in the  
7 action on behalf of the assembly. The committee on assembly organization may  
8 obtain legal counsel other than from the department of justice, with the cost of  
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the  
10 assembly in any action in which the assembly intervenes.

11           (2) The committee on senate organization may intervene at any time in the  
12 action on behalf of the senate. The committee on senate organization may obtain  
13 legal counsel other than from the department of justice, with the cost of  
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the  
15 senate in any action in which the senate intervenes.

16           (3) The joint committee on legislative organization may intervene at any time  
17 in the action on behalf of the state. The joint committee on legislative organization  
18 may obtain legal counsel other than from the department of justice, with the cost of  
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

**SECTION 1**

1 determined by the cochairpersons, to represent the state in any action in which the  
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint  
5 committee for review of administrative rules or their designated agents shall accept  
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that  
7 the legislature should be represented in the proceeding, it shall request the joint  
8 committee on legislative organization to designate the legislature's representative  
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of  
10 participation in the proceeding shall be paid equally from the appropriations under  
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice  
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 13.90 (2) The cochairpersons of the joint committee on legislative organization  
15 or their designated agent shall accept service made under ~~s. ss.~~ 806.04 (11) and  
16 893.825 (2). If the committee, the senate organization committee, or the assembly  
17 organization committee, determines that the legislature should be represented  
18 intervene in the proceeding, that committee shall designate the legislature's  
19 representative for the proceeding. as provided under s. 803.09 (2m), the assembly  
20 shall represent the assembly, the senate shall represent the senate, and the joint  
21 committee on legislative organization shall represent the state. In an action  
22 involving the constitutionality of a statute, or challenging a statute as violating or  
23 preempted by federal law, if the joint committee on legislative organization  
24 determines at any time that the interests of the state will be best represented by  
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney  
2 general may not participate in the action. Special counsel appointed under this  
3 subsection shall have the powers of the attorney general with respect to the litigation  
4 to which special counsel has been appointed. The costs of participation in the  
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and  
6 (b), except that such costs incurred by the department of justice shall be paid from  
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If  
10 the joint committee on legislative organization intervenes in an action in state or  
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the  
12 court of the substitution of counsel by special counsel appointed by the joint  
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to  
15 read:

16 165.08 (1) Any civil action prosecuted by the department by direction of any  
17 officer, department, board, or commission, ~~shall be compromised or discontinued~~  
18 ~~when so directed by such officer, department, board, or commission.~~

19 <sup>not</sup> (2) <sup>or any</sup> Any civil action prosecuted by the department on the initiative of the  
20 attorney general, or at the request of any individual may be compromised or  
21 discontinued ~~with the approval of the governor~~ <sup>only</sup> by ~~submitting~~ <sup>submission of</sup> a proposed plan to the  
22 joint committee on finance for the approval of the committee. The compromise or  
23 discontinuance may occur only if the joint committee on finance approves the  
24 proposed plan. No proposed plan may be submitted to the joint committee on finance  
25 if the plan concedes the unconstitutionality or other invalidity of a statute, facially

1 or as applied, or concedes that a statute violates or is preempted by federal law,  
2 without the approval of the joint committee on legislative organization.

3 <sup>(2)</sup>  
3 (3) In any criminal action prosecuted by the attorney general, the department  
4 shall have the same powers with reference to such action as are vested in district  
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is  
7 amended to read:

8 **165.10 Limits on expenditure Deposit of discretionary settlement**  
9 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend  
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed  
11 under the terms of the settlement, the attorney general shall submit to the joint  
12 committee on finance a proposed plan for the expenditure of the funds. If the  
13 cochairpersons of the committee do not notify the attorney general within 14 working  
14 days after the submittal that the committee has scheduled a meeting for the purpose  
15 of reviewing the proposed plan, the attorney general may expend the funds to  
16 implement the proposed plan. If, within 14 working days after the submittal, the  
17 cochairpersons of the committee notify the attorney general that the committee has  
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
19 general may expend the funds only to implement the plan as approved by the  
20 committee into the general fund.

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in  
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative  
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the  
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,  
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit  
3 court in which the state is a party. Nothing The joint committee on legislative  
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the  
5 committee intervenes, the attorney general shall notify the court of the substitution  
6 of counsel by special counsel appointed by the committee to represent the state and  
7 may not participate in the action, proceeding, or case. Unless the joint committee on  
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this  
9 subsection deprives or relieves the attorney general or the department of justice of  
10 any authority or duty under this chapter in any other matter.

11 SECTION 8. 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on  
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if  
14 requested by the governor or either house of the legislature, appear for and represent  
15 the state, any state department, agency, official, employee or agent, whether  
16 required to appear as a party or witness in any civil or criminal matter, and prosecute  
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in  
18 which the state or the people of this state may be interested. The joint committee on  
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any  
20 time, and if the committee intervenes, the attorney general shall notify the court of  
21 the substitution of counsel by special counsel appointed by the committee to  
22 represent the state and may not participate in the cause or matter. The public service  
23 commission may request under s. 196.497 (7) that the attorney general intervene in  
24 federal proceedings. All expenses of the proceedings shall be paid from the  
25 appropriation under s. 20.455 (1) (d).

1       **SECTION 9.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and  
2       amended to read:

3       165.25 (6) (a) 1. At Except as provided in ss. 806.04 (11) and 893.825 (2), at the  
4       request of the head of any department of state government, the attorney general may  
5       appear for and defend any state department, or any state officer, employee, or agent  
6       of the department in any civil action or other matter brought before a court or an  
7       administrative agency which is brought against the state department, or officer,  
8       employee, or agent for or on account of any act growing out of or committed in the  
9       lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
10      expenses determined by the attorney general to be reasonable and necessary to the  
11      defense in the action or proceeding shall be paid as provided for in s. 885.07. The  
12      attorney general may compromise and settle the action as the attorney general  
13      determines to be in the best interest of the state except that, if the action is for  
14      injunctive relief or there is a proposed consent decree, the attorney general may not  
15      compromise or settle the action without first submitting a proposed plan to the joint  
16      committee on finance. If, within 14 working days after the plan is submitted, the  
17      cochairpersons of the committee notify the attorney general that the committee has  
18      scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
19      general may compromise or settle the action only with the approval of the committee.  
20      The attorney general may not submit a proposed plan to the joint committee on  
21      finance under this subdivision in which the plan concedes the unconstitutionality or  
22      other invalidity of a statute, facially or as applied, or concedes that a statute violates  
23      or is preempted by federal law, without the approval of the joint committee on  
24      legislative organization.

1           2. Members, officers, and employees of the Wisconsin state agencies building  
2 corporation and the Wisconsin state public building corporation are covered by this  
3 section. Members of the board of governors created under s. 619.04 (3), members of  
4 a committee or subcommittee of that board of governors, members of the injured  
5 patients and families compensation fund peer review council created under s.  
6 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
7 covered by this section with respect to actions, claims, or other matters arising  
8 before, on, or after April 25, 1990. The attorney general may compromise and settle  
9 claims asserted before such actions or matters formally are brought or may delegate  
10 such authority to the department of administration. This paragraph may not be  
11 construed as a consent to sue the state or any department thereof or as a waiver of  
12 state sovereign immunity.

13           **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14           803.09 (2m) When a party to an action challenges in state or federal court the  
15 constitutionality of a statute, facially or as applied, or challenges a statute as  
16 violating or preempted by federal law, as part of a claim or affirmative defense, the  
17 assembly, the senate, and the state legislature may intervene at any time in the  
18 action as a matter of right by serving a motion upon the parties as provided in s.  
19 801.14.

20           **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21           806.04 (11) **PARTIES.** When declaratory relief is sought, all persons shall be  
22 made parties who have or claim any interest which would be affected by the  
23 declaration, and no declaration may prejudice the right of persons not parties to the  
24 proceeding. In any proceeding which involves the validity of a municipal ordinance  
25 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

## SECTION 11

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in  
2 violation of or preempted by federal law, the attorney general shall also be served  
3 with a copy of the proceeding and, except as provided under this subsection, be  
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation  
5 of or preempted by federal law, the speaker of the assembly, the president of the  
6 senate, and the senate majority leader shall also be served with a copy of the  
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be  
8 heard. If the assembly, the senate, or the joint committee on legislative organization  
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the  
10 assembly, the senate shall represent the senate, and the joint committee on  
11 legislative organization shall represent the state. In an action involving the  
12 constitutionality of a statute, or challenging a statute as violating or preempted by  
13 federal law, if the joint committee on legislative organization determines at any time  
14 that the interests of the state will be best represented by special counsel appointed  
15 by the legislature, it shall appoint special counsel to represent state defendants and  
16 act instead of the attorney general and the attorney general may not participate in  
17 the action. Special counsel appointed under this subsection shall have the powers  
18 of the attorney general with respect to the litigation to which special counsel has been  
19 appointed. In any proceeding under this section in which the constitutionality,  
20 construction or application of any provision of ch. 227, or of any statute allowing a  
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
23 review of administrative rules shall be served with a copy of the petition and, with  
24 the approval of the joint committee on legislative organization, shall be made a party  
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1 ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~  
2 ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~  
3 ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~  
4 ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~  
5 ~~legislative organization shall be served with a copy of the petition and the joint~~  
6 ~~committee on legislative organization, the senate committee on organization or the~~  
7 ~~assembly committee on organization may intervene as a party to the proceedings and~~  
8 ~~be heard.~~

9 **SECTION 12.** 809.13 of the statutes is amended to read:

10 **809.13 Rule (Intervention).** A person who is not a party to an appeal may  
11 file in the court of appeals a petition to intervene in the appeal. A party may file a  
12 response to the petition within 11 days after service of the petition. The court may  
13 grant the petition upon a showing that the petitioner's interest meets the  
14 requirements of s. 803.09 (1) ~~or~~, (2), or (2m).

15 **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
16 statutes is amended to read:

17 **CHAPTER 893**

18 **SUBCHAPTER VIII**

19 **CLAIMS AGAINST GOVERNMENTAL**  
20 **BODIES, OFFICERS AND EMPLOYEES;**

21 **ACTIONS ALLEGING A STATUTE IS**

22 **UNCONSTITUTIONAL OR**

23 **OTHERWISE INVALID**

24 **SECTION 14.** 893.825 of the statutes is created to read:

1           **893.825 Actions alleging a statute is unconstitutional or in violation of**  
2           **or preempted by federal law.** (1) In an action in which a statute is alleged to be  
3           unconstitutional, or to be in violation of or preempted by federal law, the attorney  
4           general shall be served with a copy of the proceeding and, except as provided in sub.  
5           (2), is entitled to represent the state and be heard.

6           (2) In an action in which a statute is alleged to be unconstitutional, or to be in  
7           violation of or preempted by federal law, the speaker of the assembly, the president  
8           of the senate, and the senate majority leader shall also be served with a copy of the  
9           proceeding and the assembly, the senate, and the joint committee on legislative  
10          organization are entitled to be heard.

11           **SECTION 15. Nonstatutory provisions.**

12          (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE  
13          ORGANIZATION. The assembly, senate, and joint committee on legislative organization  
14          may intervene as permitted under s. 803.09 (2m) in any litigation pending in state  
15          or federal court on the effective date of this subsection. If the joint committee on  
16          legislative organization intervenes and appoints special counsel to represent state  
17          defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall  
18          notify the court of the substitution of counsel by special counsel appointed by the joint  
19          committee on legislative organization to represent the state defendants and may not  
20          participate in the action.

21           **SECTION 16. Fiscal changes.**

22          (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the  
23          appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

1       there is lapsed to the general fund the unencumbered balance of any settlement

2 funds in that appropriation account, as determined by the attorney general.

3 (END)

## RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

Appendix R ... has been added to the 2017 LRB-6074

Appendix A	LRB 17-5979	Appendix W	LRB 17-6028
Appendix B	LRB 17-5982	Appendix X	LRB 17-6031
Appendix C	LRB 17-5983	Appendix Y	LRB 17-6036
Appendix D	LRB 17-5985	Appendix Z	LRB 17-6037
Appendix E	LRB 17-5986	Appendix AA	LRB 17-6038
Appendix F	LRB 17-5989	Appendix BB	LRB 17-6039
Appendix G	LRB 17-5990	Appendix CC	LRB 17-6040
Appendix H	LRB 17-5995	Appendix DD	LRB 17-6041
Appendix I	LRB 17-5998	Appendix EE	LRB 17-6042
Appendix J	LRB 17-6001	Appendix FF	LRB 17-6043
Appendix K	LRB 17-6004	Appendix GG	LRB 17-6046
Appendix L	LRB 17-6006	Appendix HH	LRB 17-6047
Appendix M	LRB 17-6007	Appendix II	LRB 17-6048
Appendix N	LRB 17-6012	Appendix JJ	LRB 17-6049
Appendix O	LRB 17-6015	Appendix KK	LRB 17-6050
Appendix P	LRB 17-6017	Appendix LL	LRB 17-6051
Appendix Q	LRB 17-6019	Appendix MM	LRB 17-6052
Appendix R	LRB 17-6021	Appendix NN	LRB 17-6058
Appendix S	LRB 17-6023	Appendix OO	LRB 17-6059
Appendix T	LRB 17-6024	Appendix PP	LRB 17-6065
Appendix U	LRB 17-6025	Appendix QQ	LRB 17-6067
Appendix V	LRB 17-6027		



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRB-6021/P10  
SWB/RAC/CMH:all

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT** *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),  
2           13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter  
3           VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,  
4           803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature  
5           of claims relating to constitutionality or enforceability of statutes and right of  
6           the legislature to intervene and state settlement moneys and the settlement  
7           authority of the attorney general.

---

***Analysis by the Legislative Reference Bureau***

***Notice to legislature of claims relating to constitutionality of statutes;  
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

***State settlement moneys and settlement authority of attorney general***

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1           **SECTION 1.** 13.365 of the statutes is created to read:

2           **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action  
3 challenges in state or federal court the constitutionality of a statute, facially or as  
4 applied, or challenges a statute as violating or preempted by federal law, as part of  
5 a claim or affirmative defense:

6           (1) The committee on assembly organization may intervene at any time in the  
7 action on behalf of the assembly. The committee on assembly organization may  
8 obtain legal counsel other than from the department of justice, with the cost of  
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the  
10 assembly in any action in which the assembly intervenes.

11           (2) The committee on senate organization may intervene at any time in the  
12 action on behalf of the senate. The committee on senate organization may obtain  
13 legal counsel other than from the department of justice, with the cost of  
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the  
15 senate in any action in which the senate intervenes.

16           (3) The joint committee on legislative organization may intervene at any time  
17 in the action on behalf of the state. The joint committee on legislative organization  
18 may obtain legal counsel other than from the department of justice, with the cost of  
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

## SECTION 1

1 determined by the cochairpersons, to represent the state in any action in which the  
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 **13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS.** The cochairpersons of the joint  
5 committee for review of administrative rules or their designated agents shall accept  
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that  
7 the legislature should be represented in the proceeding, it shall request the joint  
8 committee on legislative organization to designate the legislature's representative  
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of  
10 participation in the proceeding shall be paid equally from the appropriations under  
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice  
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 **13.90 (2)** The cochairpersons of the joint committee on legislative organization  
15 or their designated agent shall accept service made under ~~s. ss.~~ ss. 806.04 (11) and  
16 893.825 (2). If the committee, the senate organization committee, or the assembly  
17 organization committee, determines that the legislature should be represented  
18 intervene in the proceeding, that committee shall designate the legislature's  
19 representative for the proceeding. as provided under s. 803.09 (2m), the assembly  
20 shall represent the assembly, the senate shall represent the senate, and the joint  
21 committee on legislative organization shall represent the state. In an action  
22 involving the constitutionality of a statute, or challenging a statute as violating or  
23 preempted by federal law, if the joint committee on legislative organization  
24 determines at any time that the interests of the state will be best represented by  
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney  
2 general may not participate in the action. Special counsel appointed under this  
3 subsection shall have the powers of the attorney general with respect to the litigation  
4 to which special counsel has been appointed. The costs of participation in the  
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and  
6 (b), except that such costs incurred by the department of justice shall be paid from  
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If  
10 the joint committee on legislative organization intervenes in an action in state or  
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the  
12 court of the substitution of counsel by special counsel appointed by the joint  
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to  
15 read:

16 165.08 (1) Any civil action prosecuted by the department by direction of any  
17 officer, department, board, or commission, ~~shall be compromised or discontinued~~  
18 ~~when so directed by such officer, department, board or commission.~~ Any or any civil  
19 action prosecuted by the department on the initiative of the attorney general, or at  
20 the request of any individual may be compromised or discontinued with the approval  
21 of the governor only by submission of a proposed plan to the joint committee on  
22 finance for the approval of the committee. The compromise or discontinuance may  
23 occur only if the joint committee on finance approves the proposed plan. No proposed  
24 plan may be submitted to the joint committee on finance if the plan concedes the  
25 unconstitutionality or other invalidity of a statute, facially or as applied, or concedes

1 that a statute violates or is preempted by federal law, without the approval of the  
2 joint committee on legislative organization.

3 (2) In any criminal action prosecuted by the attorney general, the department  
4 shall have the same powers with reference to such action as are vested in district  
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is  
7 amended to read:

8 **165.10 Limits on expenditure Deposit of discretionary settlement**  
9 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend  
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed  
11 under the terms of the settlement, the attorney general shall submit to the joint  
12 committee on finance a proposed plan for the expenditure of the funds. If the  
13 cochairpersons of the committee do not notify the attorney general within 14 working  
14 days after the submittal that the committee has scheduled a meeting for the purpose  
15 of reviewing the proposed plan, the attorney general may expend the funds to  
16 implement the proposed plan. If, within 14 working days after the submittal, the  
17 cochairpersons of the committee notify the attorney general that the committee has  
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
19 general may expend the funds only to implement the plan as approved by the  
20 committee into the general fund.

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in  
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative  
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the  
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,  
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit  
3 court in which the state is a party. ~~Nothing~~ The joint committee on legislative  
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the  
5 committee intervenes, the attorney general shall notify the court of the substitution  
6 of counsel by special counsel appointed by the committee to represent the state and  
7 may not participate in the action, proceeding, or case. Unless the joint committee on  
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this  
9 subsection deprives or relieves the attorney general or the department of justice of  
10 any authority or duty under this chapter in any other matter.

11 **SECTION 8.** 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on  
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if  
14 requested by the governor or either house of the legislature, appear for and represent  
15 the state, any state department, agency, official, employee or agent, whether  
16 required to appear as a party or witness in any civil or criminal matter, and prosecute  
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in  
18 which the state or the people of this state may be interested. The joint committee on  
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any  
20 time, and if the committee intervenes, the attorney general shall notify the court of  
21 the substitution of counsel by special counsel appointed by the committee to  
22 represent the state and may not participate in the cause or matter. The public service  
23 commission may request under s. 196.497 (7) that the attorney general intervene in  
24 federal proceedings. All expenses of the proceedings shall be paid from the  
25 appropriation under s. 20.455 (1) (d).

**SECTION 9**

1       **SECTION 9.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and  
2 amended to read:

3       165.25 (6) (a) 1. At Except as provided in ss. 806.04 (11) and 893.825 (2), at the  
4 request of the head of any department of state government, the attorney general may  
5 appear for and defend any state department, or any state officer, employee, or agent  
6 of the department in any civil action or other matter brought before a court or an  
7 administrative agency which is brought against the state department, or officer,  
8 employee, or agent for or on account of any act growing out of or committed in the  
9 lawful course of an officer's, employee's, or agent's duties. Witness fees or other  
10 expenses determined by the attorney general to be reasonable and necessary to the  
11 defense in the action or proceeding shall be paid as provided for in s. 885.07. The  
12 attorney general may compromise and settle the action as the attorney general  
13 determines to be in the best interest of the state except that, if the action is for  
14 injunctive relief or there is a proposed consent decree, the attorney general may not  
15 compromise or settle the action without first submitting a proposed plan to the joint  
16 committee on finance. If, within 14 working days after the plan is submitted, the  
17 cochairpersons of the committee notify the attorney general that the committee has  
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney  
19 general may compromise or settle the action only with the approval of the committee.  
20 The attorney general may not submit a proposed plan to the joint committee on  
21 finance under this subdivision in which the plan concedes the unconstitutionality or  
22 other invalidity of a statute, facially or as applied, or concedes that a statute violates  
23 or is preempted by federal law, without the approval of the joint committee on  
24 legislative organization.

1           2. Members, officers, and employees of the Wisconsin state agencies building  
2           corporation and the Wisconsin state public building corporation are covered by this  
3           section. Members of the board of governors created under s. 619.04 (3), members of  
4           a committee or subcommittee of that board of governors, members of the injured  
5           patients and families compensation fund peer review council created under s.  
6           655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are  
7           covered by this section with respect to actions, claims, or other matters arising  
8           before, on, or after April 25, 1990. The attorney general may compromise and settle  
9           claims asserted before such actions or matters formally are brought or may delegate  
10          such authority to the department of administration. This paragraph may not be  
11          construed as a consent to sue the state or any department thereof or as a waiver of  
12          state sovereign immunity.

13           **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14           **803.09 (2m)** When a party to an action challenges in state or federal court the  
15          constitutionality of a statute, facially or as applied, or challenges a statute as  
16          violating or preempted by federal law, as part of a claim or affirmative defense, the  
17          assembly, the senate, and the state legislature may intervene at any time in the  
18          action as a matter of right by serving a motion upon the parties as provided in s.  
19          801.14.

20           **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21           **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be  
22          made parties who have or claim any interest which would be affected by the  
23          declaration, and no declaration may prejudice the right of persons not parties to the  
24          proceeding. In any proceeding which involves the validity of a municipal ordinance  
25          or franchise, the municipality shall be made a party, and shall be entitled to be heard.

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in  
2 violation of or preempted by federal law, the attorney general shall also be served  
3 with a copy of the proceeding and, except as provided under this subsection, be  
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation  
5 of or preempted by federal law, the speaker of the assembly, the president of the  
6 senate, and the senate majority leader shall also be served with a copy of the  
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be  
8 heard. If the assembly, the senate, or the joint committee on legislative organization  
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the  
10 assembly, the senate shall represent the senate, and the joint committee on  
11 legislative organization shall represent the state. In an action involving the  
12 constitutionality of a statute, or challenging a statute as violating or preempted by  
13 federal law, if the joint committee on legislative organization determines at any time  
14 that the interests of the state will be best represented by special counsel appointed  
15 by the legislature, it shall appoint special counsel to represent state defendants and  
16 act instead of the attorney general and the attorney general may not participate in  
17 the action. Special counsel appointed under this subsection shall have the powers  
18 of the attorney general with respect to the litigation to which special counsel has been  
19 appointed. In any proceeding under this section in which the constitutionality,  
20 construction or application of any provision of ch. 227, or of any statute allowing a  
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as  
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for  
23 review of administrative rules shall be served with a copy of the petition and, with  
24 the approval of the joint committee on legislative organization, shall be made a party  
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1     ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~  
2     ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~  
3     ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~  
4     ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~  
5     ~~legislative organization shall be served with a copy of the petition and the joint~~  
6     ~~committee on legislative organization, the senate committee on organization or the~~  
7     ~~assembly committee on organization may intervene as a party to the proceedings and~~  
8     ~~be heard.~~

9           **SECTION 12.** 809.13 of the statutes is amended to read:

10          **809.13 Rule (Intervention).** A person who is not a party to an appeal may  
11     file in the court of appeals a petition to intervene in the appeal. A party may file a  
12     response to the petition within 11 days after service of the petition. The court may  
13     grant the petition upon a showing that the petitioner's interest meets the  
14     requirements of s. 803.09 (1) ~~or~~, (2), or (2m).

15          **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the  
16     statutes is amended to read:

17                                   **CHAPTER 893**

18                                   **SUBCHAPTER VIII**

19                                   **CLAIMS AGAINST GOVERNMENTAL**

20                                   **BODIES, OFFICERS AND EMPLOYEES;**

21                                   **ACTIONS ALLEGING A STATUTE IS**

22                                   **UNCONSTITUTIONAL OR**

23                                   **OTHERWISE INVALID**

24          **SECTION 14.** 893.825 of the statutes is created to read:

1       **893.825 Actions alleging a statute is unconstitutional or in violation of**  
2       **or preempted by federal law.** (1) In an action in which a statute is alleged to be  
3       unconstitutional, or to be in violation of or preempted by federal law, the attorney  
4       general shall be served with a copy of the proceeding and, except as provided in sub.  
5       (2), is entitled to represent the state and be heard.

6       (2) In an action in which a statute is alleged to be unconstitutional, or to be in  
7       violation of or preempted by federal law, the speaker of the assembly, the president  
8       of the senate, and the senate majority leader shall also be served with a copy of the  
9       proceeding and the assembly, the senate, and the joint committee on legislative  
10      organization are entitled to be heard.

11      **SECTION 15. Nonstatutory provisions.**

12      (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE  
13      ORGANIZATION. The assembly, senate, and joint committee on legislative organization  
14      may intervene as permitted under s. 803.09 (2m) in any litigation pending in state  
15      or federal court on the effective date of this subsection. If the joint committee on  
16      legislative organization intervenes and appoints special counsel to represent state  
17      defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall  
18      notify the court of the substitution of counsel by special counsel appointed by the joint  
19      committee on legislative organization to represent the state defendants and may not  
20      participate in the action.

21      **SECTION 16. Fiscal changes.**

22      (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the  
23      appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

there is lapsed to the general fund the unencumbered balance of any settlement funds in that appropriation account, as determined by the attorney general.

(END)